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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGIONAL ADMINISTRATOR
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

July 19, 2022

The Honorable Eric Holcomb
Governor of Indiana
State House, Second Floor
Indianapolis, Indiana 46204

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Dear Governor Holcomb:

Thank you for your letter of April 22, 2022 expressing your support for the City of Fort Wayne, Indiana's appeal of the U.S. Environmental Protection Agency's determination that the City's Brownfield Hazardous Waste Cleanup Grant application for the former OmniSource property is ineligible for funding. Unfortunately, EPA cannot consider funding Fort Wayne's application because it did not meet a statutory eligibility requirement for a Brownfield Cleanup Grant. EPA does not have the authority to waive statutory requirements.

By way of background, EPA's Office of Land and Emergency Management issued the Request for Applications (RFA) under Section 104(k) of CERCLA, 42 U.S.C. § 9604(k), as amended by the Brownfields Utilization, Investment, and Local Development Act (P.L. 115-141). The RFA sets forth threshold criteria, which ensure applicants are eligible to receive Cleanup Grants. These criteria are pass/fail and relate to applicant and site eligibility. Applications must pass all the threshold criteria to be evaluated against the ranking criteria in the RFA. We must apply these threshold requirements consistently to treat all applicants fairly.

Through the threshold criteria, an applicant must demonstrate it is not liable for contamination at a site. For sites contaminated with hazardous substances, entities that may be found liable for contamination under CERCLA Section 107 are not eligible for Brownfields Grants, as provided in CERCLA Section 104(k)(5)(B). Therefore, to be eligible for a grant to address hazardous substances at a brownfield site, an entity owning the property must demonstrate, among other things, it meets the requirements for asserting an affirmative defense to CERCLA liability through one of the landowner liability protections, including the bona fide prospective purchaser (BFPP) liability protection at CERCLA Section 101(40). To qualify for the BFPP liability protection, an applicant must meet specified criteria, including having conducted all appropriate inquiries (AAI) prior to

acquiring the property. 42 U.S.C. § 9601(40)(B)(ii).¹ For properties acquired on or after November 1, 2006, one way to fulfill this requirement is by demonstrating compliance with the AAI final rule at 40 C.F.R. Part 312.

The AAI rule lays out the parameters for conducting a Phase I Environmental Site Assessment (ESA). A Phase I ESA must be “conducted or updated within 180 days of and prior to the date of acquisition of the subject property” and requires a specific declaration and signature by an environmental professional be included in the final report. 40 C.F.R. §§ 312.20(b)(5) and 312.21(d). This declaration and signature must document compliance with the aforementioned requirement.

EPA Region 5 staff initially reviewed Fort Wayne’s application and found it failed to meet the threshold criterion that requires a Phase I ESA to be completed within 180 days prior to acquiring a property. EPA sought additional information in an effort to allow Fort Wayne to establish eligibility and Fort Wayne provided that information. EPA ultimately determined Fort Wayne could not demonstrate the ESA was completed prior to the City acquiring the Property; rather, the evidence demonstrated Fort Wayne’s consulting company signed and issued the Phase I ESA one day after Fort Wayne acquired the Property. The City appealed that determination to the Region 5 Grant Competition Dispute Decision Official (GCDDO).²

The record before the GCDDO established the Phase I ESA submitted by the City of Fort Wayne was signed and dated by its environmental consultants one day after Fort Wayne acquired the Property. The cover page was dated the same. Although Fort Wayne presented a number of legal and equitable arguments to the GCDDO, the City ultimately acknowledged it was unable to provide EPA with evidence (i.e., hard copies) that it finalized the Phase I ESA prior to acquiring the Property. On that basis, the GCDDO found EPA’s ineligibility determination was reasonably grounded on the requirements of CERCLA, the AAI rule, and the terms of the RFA. A copy of the GCDDO decision sustaining EPA’s determination is attached.

In your letter, you support the City’s request for the GCDDO to waive the requirement that a Phase I ESA be completed within 180 days prior to acquiring a property to be eligible for the BFPP liability exemption under CERCLA. You indicated you believe the dates on the ESA report are the result of a clerical error made by the City’s outside consultant. The GCDDO’s decision had to be based on the record before her, the provisions of the AAI rule

¹ See also, 42 U.S.C. § 9601(35)(B), 40 C.F.R. § 312.20, and RFA No. EPA-OLEM-OBLR-21-06 (RFA), at 20. The EPA Office of Enforcement and Compliance Assurance’s interpretation of the BFPP requirements (including AAI, on page 5) is in the 2019 “Common Elements” Guidance, here: <https://www.epa.gov/enforcement/common-elements-guidance>.

² EPA’s grants competition dispute resolution procedures were published in 70 Fed. Reg. 3629 (Jan. 26, 2005).

and the RFA, and the standard for reviewing ineligibility determinations. The City was unable to demonstrate that EPA's ineligibility decision was erroneous through concrete evidence of completion of the ESA 180 days prior to Fort Wayne's purchase of the property. Additionally, although Fort Wayne could establish that the ESA was completed one day after the City acquired the property, there is no provision of the AAI regulation that allows EPA to waive the 180-day rule nor in CERCLA 104(k)(5)(B)(iii) to award a grant to a recipient that is potentially liable under CERCLA Section 107. All applicants for Brownfields Cleanup Grants must comply with these requirements.

EPA as a whole, and Region 5 specifically, take great pride in the Brownfields Program. As of April 2022, the Region 5 Brownfields Program has assessed 8,522 properties, cleaned up 431 sites, leveraged more than \$7.14 billion, and created 47,332 jobs over the last 17 years. Notwithstanding our determination that Fort Wayne did not meet statutory eligibility requirements for a Cleanup Grant, we applaud Fort Wayne's ongoing involvement in cleaning up contaminated sites and commitment to revitalizing its community. EPA may be able to provide technical assistance to Fort Wayne through its Technical Assistance to Brownfields (TAB) Communities program. The TAB program provides technical assistance to communities and other stakeholders on brownfields-related issues with the goal of increasing the community's understanding and involvement in brownfields cleanup and revitalization and helping to move brownfield sites toward cleanup and reuse. Additionally, the Infrastructure Investment and Jobs Act provided EPA with additional funding for Brownfields Grants and we would welcome applications from Fort Wayne for cleanup or assessment funding for other sites in the City.

Thank you again for your letter. If you have further questions, please contact me or your staff may contact Ronna Beckmann, Region 5 Congressional and Intergovernmental Liaison, at 312.886.3000.

Sincerely,



Debra Shore
Regional Administrator
& Great Lakes National Program Manager
US EPA Region 5



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5
77 WEST JACKSON BOULEVARD
CHICAGO, IL 60604-3590

BY EMAIL

Lindsey Maksim
City of Fort Wayne, Department of Redevelopment
200 E Berry St. Suite 320
Fort Wayne, IN 46802
Lindsey.Maksim@cityoffortwayne.org

RE: City of Fort Wayne, IN-Brownfield Cleanup Grant Dispute
RFA No. EPA-OLEM-OBLR-21-06

Dear Ms. Maksim:

This is my decision, as the Grants Competition Dispute Decision Official (GCDDO) for the U.S. Environmental Protection Agency (EPA), Region 5, on the grant competition dispute initiated by City of Fort Wayne, Indiana (Fort Wayne) regarding Request for Applications (RFA) No. EPA-OLEM-OBLR-21-06. I am issuing this decision under the dispute resolution procedures of EPA Order 5700.5A1, Policy for the Competition of Assistance Agreements (Competition Policy), Appendix A, published in 70 Fed. Reg. 3629, 3630 (Jan. 26, 2005). In its dispute, Fort Wayne challenged EPA's determination that it failed to meet a threshold criterion for Brownfield hazardous substance cleanup grants; specifically, that Fort Wayne failed to complete its Phase I environmental site assessment (ESA) within 180 days prior to acquisition of the subject property and, therefore, was ineligible to be considered for funding.

EPA's determination that Fort Wayne did not timely complete its Phase I ESA, a threshold criterion for brownfield hazardous substance cleanup grants and, therefore, was ineligible to be considered for a brownfield cleanup grant, was reasonable and consistent with the terms of the RFA. Fort Wayne's dispute is denied.

I. Procedural History

EPA's Office of Land and Emergency Management issued the RFA under Section 104(k) of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9604(k), as amended by the Brownfields Utilization, Investment, and Local Development Act (P.L. 115-141). These grants provide federal financial assistance for brownfield revitalization, including cleanup grants. In Fiscal Year 2022, an eligible entity could apply for one cleanup grant, seeking a maximum of \$500,000 to conduct cleanup activity on one brownfield site or to allocate up to \$500,000 among multiple sites. An applicant that planned to only address one brownfield site could request a waiver of the \$500,000 limit and request up to \$650,000 based on the anticipated level of contamination, size, and other considerations. The closing date on the RFA was December 1, 2021.

The RFA sets forth threshold criteria, which ensure applicants are eligible to receive cleanup grants. These criteria are pass/fail and relate to applicant and site eligibility. Applications must pass all the threshold criteria to be evaluated against the ranking criteria in the RFA.

Through the threshold criteria, an applicant must demonstrate it is not liable for contamination at a site. For sites contaminated with hazardous substances, entities that may be found liable for contamination under CERCLA Section 107 are not eligible for grants. Therefore, to be eligible for a grant to address hazardous substances at a brownfield property, an entity must demonstrate, among other things, it meets the requirements for asserting an affirmative defense to CERCLA liability through one of the landowner liability protections, including the bona fide prospective purchase (BFPP) liability protection at CERCLA Section 101(40), 42 U.S.C. § 9601(40).

To assert BFPP liability protection, an applicant must meet specified criteria, including having “conducted all appropriate inquiries (AAI) prior to acquiring the property.”¹ For properties acquired on or after November 1, 2006, one way to fulfill this requirement is by demonstrating compliance with the AAI final rule at 40 C.F.R. Part 312.

The AAI rule requires the following declaration and signature by an environmental professional:

[I, We] declare that, to the best of [my, our] professional knowledge and belief, [I, we] meet the definition of Environmental Professional as defined in [40 C.F.R.] § 312.10.

[I, We] have the specific qualifications based on education, training, and experience to assess a property of the nature, history, and setting of the subject property. [I, We] have developed and performed the all appropriate inquiries in conformance with the standards and practices set forth in 40 C.F.R. Part 312.

40 C.F.R. § 312.21(d). This declaration must be “conducted or updated within 180 days of and prior to the date of acquisition of the subject property.” 40 C.F.R. § 312.20(b)(5).

On November 30, 2021, Fort Wayne submitted an application to EPA, requesting \$500,000 and waiver of the \$500,000 limit, for a maximum of \$650,000 to remediate contamination on an 8.16-acre parcel of vacant land on the former OmniSource property (Property) at 1610 North Calhoun Avenue, Fort Wayne, Indiana. In its application, Fort Wayne stated it acquired the property on November 30, 2017. On behalf of Fort Wayne, IWM Consulting completed and issued Phase I ESAs for the Property on February 25, 2013, and December 1, 2017.

EPA initially reviewed Fort Wayne’s application and found it failed to meet the threshold criterion that requires a Phase I ESA to be completed within 180 days prior to acquiring a property. EPA sought additional information, which Fort Wayne provided.² EPA ultimately determined Fort Wayne could not demonstrate the ESA was completed prior to the City acquiring the Property; rather, the evidence demonstrated Fort Wayne’s consulting company signed and issued the Phase I ESA one day after Fort Wayne acquired the Property.

By letter dated January 4, 2022, EPA notified Fort Wayne it failed to have a Phase I ESA completed within 180 days prior to acquisition of the Property, and therefore, failed to meet a

¹ RFA No. EPA-OLEM-OBLR-21-06 (RFA), at 20 (emphasis in the original).

² Letter from Britney Nadler, Region 5 Brownfields Program to Ann Coyle, Region 5 GCDDO, (Apr. 7, 2022), at 3 (April 7 Nadler letter).

threshold eligibility criterion for a Fiscal Year 2022 Brownfields cleanup grant. Fort Wayne timely requested a debriefing on EPA's decision, which was held on January 31, 2022. Fort Wayne timely initiated its dispute by email dated February 14, 2022.

To support this decision, I asked EPA and Fort Wayne to provide certain additional information and any documents or information they considered relevant or material to the dispute. Both parties timely responded. I have carefully considered the information before me.

II. Analysis

A. Standard of Review

In grant competition disputes, it is not the role of the GCDDO to second guess the Agency's evaluation of an application or to re-evaluate an applicant's application. Rather, the GCDDO examines whether, based on the record, the Agency's evaluation was reasonable and consistent with the terms of the RFA, the evaluation criteria and any applicable statutes, regulations, and policies. A disputant's mere disagreement with EPA's judgment does not establish that it was unreasonable.

Section V.I.E of the RFA sets forth the process for challenging decisions under the RFA. Assistance agreement competition-related disputes are to be resolved according to the dispute resolution procedures in the Competition Policy.³ As provided there, a GCDDO must consider disputes where the applicant challenges the decision that it is not eligible for award consideration because EPA determined its application did not meet the threshold eligibility requirements in the RFA. That is the case here.

B. Fort Wayne's Dispute

Fort Wayne disputes EPA's determination that it failed to meet the threshold criterion of completing a Phase I ESA within 180 days prior to acquiring the Property. Fort Wayne acknowledges the Phase I ESA for the Property was dated December 1, 2017—one day after it acquired the Property;⁴ however, Fort Wayne contends it worked closely with its consultant on the preparation of the ESA and was aware of its findings before it acquired the property on November 30, 2017. The City also argued that, even if there was a "technical" violation, its "substantial compliance" with the AAI requirements were sufficient to satisfy the BFPP defense under CERCLA, citing *Ashley II of Charleston, LLC v. PCS Nitrogen, Inc.*, 791 F. Supp. 2d 431, 500 (D.S.C. 2011).⁵

Fort Wayne's reliance on *Ashley II* is misplaced. In this federal district court case out of South Carolina, *Ashley II of Charleston, LLC* had hired a contractor, GEL, to conduct a Phase I ESA

³ The Federal Register notice references regulations at 40 C.F.R. Parts 30 and 31 that have been superseded by regulations in 2 C.F.R. Parts 200 and 1500. Notwithstanding the regulatory changes, the procedures for competition-related disputes remain unchanged, as indicated in 2 C.F.R. Part 1500, Subpart E.

⁴ See, email from Lindsey Maksim, Brownfields Coordinator for the City of Fort Wayne, to Ann Coyle, EPA Region 5 GCDDO, (Feb. 14, 2022) (Dispute).

⁵ *Id.*

on a specific parcel according to the standards in place at the time of the acquisition.⁶ According to the opinion, GEL did so.⁷ It was the defendant in the case, PCS Nitrogen Inc., that pointed to inconsistencies between GEL's ESA and the applicable standards—not the court. The court simply noted that those inconsistencies lacked relevance.⁸ Without more information about the nature of those discrepancies, it is a stretch to suggest *Ashley II* is applicable here.

Von Duprin LLC v. Major Holdings, LLC, 12 F.4th 751 (7th Cir. Sept. 3, 2021), is more relevant. Like Fort Wayne, the *Von Duprin* case involves contaminated property in Indiana. The district court concluded Defendant Major was not a BFPP at two properties (Zimmer Paper and Ertel) because Major could not demonstrate it had satisfied the AAI requirements for those properties.⁹ The Seventh Circuit Court of Appeals affirmed.

For the Zimmer Paper property, the Seventh Circuit affirmed Major had conducted a Phase I ESA according to the appropriate standards; however, the ESA did not include attestations about the professional qualifications of the environmental professionals conducting the inquiry for the prospective purchase as required by 40 C.F.R. § 312.21(d).¹⁰ Without the attestations of the environmental professionals who completed the ESA, Major “cannot show full compliance with all requirements in the ‘all appropriate’ inquiries regulation.”¹¹

For the Ertel property, the Appellate Court again affirmed, finding Major did not qualify for the BFPP defense because of “missteps related more to timing than substance.”¹² Major leased and under CERCLA became an “operator” of the Ertel property starting in 2007. It, therefore, had to complete an environmental assessment within 180 days of becoming an operator. The Court found “[t]he company failed to do so [because the ESA was completed on] a date not within 180 days of the commencement of the lease”¹³

With the Phase I ESA environmental professional attestations being dated after Fort Wayne acquired the property, it is difficult to see how the *Von Duprin* precedent leads to any conclusion other than Fort Wayne failed to timely complete the AAI for the Property.

Fort Wayne subsequently asserted the Phase I ESA was completed on November 14, 2017, and the December 1, 2017, date was an “error.”¹⁴ It claims that it would not have presented the findings of the ESA to the City Council, which it states it did on November 21, 2017, if the Phase I ESA was not complete.¹⁵ Fort Wayne presents a number of equitable arguments about why EPA should accept its application, referring to the City's history and involvement with the

⁶ *Ashley II*, at 500.

⁷ *Id.*

⁸ *Id.*

⁹ *Von Duprin*, at 759, 761.

¹⁰ *Id.* at 769.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ Emailed letter from Karl Bandemer, Deputy Mayor, City of Fort Wayne, to Ann Coyle, EPA Region 5 GCDDO, RE: City of Fort Wayne, Indiana-Brownfield Cleanup Grant Dispute, RFA No. EPA-OLEM-OBLR-20-07 (sic) (Apr. 22, 2022), at 2 (Bandemer letter) (conveyed to Ms. Coyle by Cyndi Timm on behalf of Terri Czajka, Partner, Ice Miller LLP by email dated Apr. 22, 2022).

¹⁵ *Id.*

Property, its experience with the Brownfields program, and benefits redevelopment of the Property would provide. It provided numerous letters of support for the project.¹⁶ It concludes EPA erred in focusing on the date of the Phase I ESA, rather than when information was shared with the City about the findings, conclusions, and recommendations in the ESA.¹⁷

In its responses to Fort Wayne's arguments, EPA focuses on the AAI regulatory requirements necessary to establish BFPP status and the information it had when making the threshold criteria determination. To treat all applicants fairly and equitably, if an applicant does not meet a threshold criterion, it becomes ineligible for funding in that grant cycle. It notes that to find otherwise would be inconsistent with past EPA decisions and unfair to other applicants.¹⁸ EPA points to two different locations in the Phase I ESA that are dated after Fort Wayne acquired the property. The first is on the cover of the Phase I ESA, which is dated December 1, 2017. The second is where the environmental professionals signed and dated the attestations to their qualifications, both of whom dated their signatures on December 1, 2017.¹⁹ The .PDF copy of the Phase I ESA provided by Fort Wayne verifies this²⁰ and Fort Wayne acknowledges it was unable to provide EPA with concrete evidence (i.e., hard copies) that it finalized the Phase I ESA prior to acquiring the Property.²¹ EPA concludes that, without a signature, the Phase I ESA is incomplete, and without a complete written report, the AAI requirements are not met.²²

The Competition Policy recognizes the debriefing process may result in an applicant successfully challenging an eligibility determination;²³ however, none of the equitable arguments raised by Fort Wayne are sufficient to overcome EPA's reasonable evaluation of when Fort Wayne completed the Phase I ESA for the Property. The timing requirement was highlighted in both the RFA and its supporting frequently asked question (FAQ) document. As noted above, Section III.B.11.a.iii(1) of the RFA states, with emphasis in the original, to assert BFPP liability protection, an applicant must have "conducted all appropriate inquiries (AAI) prior to acquiring the property." The answer to Question Q.1 of the FAQ reiterates this requirement: "To qualify as a bona fide prospective purchaser, a person must ... perform AAI prior to purchase."²⁴

Fort Wayne either was or should have been aware of the timing requirements for completing the Phase I ESA for the property. Partially substantiated clerical errors by Fort Wayne's consultant are insufficient to demonstrate that EPA erred in its threshold eligibility determination. It was reasonable for EPA to conclude Fort Wayne's Phase I ESA was not completed within 180 days prior to its acquisition of the Property, which was necessary to establish the BFPP defense to liability for sites contaminated with hazardous substances and a threshold criterion to be eligible

¹⁶ *Id.* at Attachments 4-6, and 9.

¹⁷ *Id.* at 3.

¹⁸ April 7 Nadler letter, at 3.

¹⁹ *Id.* at 2-3.

²⁰ Attachment 1 to the Dispute, "Phase I Environmental Site Assessment, Proposed North River Development...", prepared for the City of Fort Wayne by IWM Consulting Group, LLC (Dec. 1, 2017), at cover page and 54.

²¹ Bandemer letter, at 3.

²² Letter from Brittney Nadler, Region 5 Brownfields Program to Ann Coyle, Region 5 GCDDO (May 3, 2022), at 2.

²³ Competition Policy, Appendix A, at 34.

²⁴ See, https://www.epa.gov/system/files/documents/2021-10/fy22-faqs_10-28-21_0.pdf, at p. 61.

for grant funding. To have found otherwise would have been inconsistent with the express requirements of CERCLA, the AAI final rule, and the RFA.

III. Conclusion

As the GCDDO, it is not my role to substitute my judgement for that of the reviewers. However, EPA's evaluations must be reasonable and consistent with the terms of the RFA, among other things. The Competition Policy states:

It is EPA policy to promote competition to the maximum extent practicable in the award of assistance agreements. When assistance agreements are awarded competitively, EPA policy requires that the competitive process be fair and impartial, that all applicants be evaluated only on the criteria stated in the announcement, and that no applicant receive an unfair competitive advantage.

In this case, based on the information included in Fort Wayne's hazardous waste cleanup grant application and subsequent submittals, EPA's evaluation of the BFPP threshold eligibility criterion for a site contaminated with hazardous substances was reasonable and consistent with the terms of the RFA. This decision is limited to the record in this dispute and a GCDDO's standard of review.

For the reasons set forth above, I have denied Fort Wayne's dispute. In accordance with Appendix A of the Competition Policy, this decision constitutes final agency action and is not subject to further review within EPA. As required by the Competition Policy, EPA's Grants Competition Advocate and Office of General Counsel have concurred on this decision.

Sincerely,

ANN COYLE

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COYLE
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Ann L. Coyle
Grants Competition Dispute Decision Official
U.S. EPA Region 5

cc by email: Nancy Townsend, Director, Fort Wayne Redevelopment Commission
Karl Bandemer, Deputy Mayor, City of Fort Wayne, Indiana
Terri Czajka, Partner, Ice Miller LLP
Timothy Haffner, Partner, Faegre Drinker Biddle & Reath LLP
Puja Lakhani, EPA Region 5, Office of Regional Counsel
Thomas Kenney, EPA Region 5, Office of Regional Counsel
Brittney Nadler, EPA Region 5, Brownfields Program
Jerry Gordon-Minor-English, EPA Office of Brownfields and Land Revitalization
James Drummond, EPA Office of General Counsel
Elizabeth January, EPA Grant Competition Advocate